

"SPECIAL INTEREST"

CASE NO.: CA 75/2006

IN THE HIGH COURT OF NAMIBIA

In the matter between:

TREVOR PIETERSE

APPELLANT

versus

THE STATE

RESPONDENT

CORAM: DAMASEB JP

Heard on: 2006.10.26

Delivered on: 2006.10.26

APEAL JUDGMENT:

DAMASEB, JP: [1] The appellant was found guilty of rape with aggravating circumstances and sentenced to 15 (fifteen) years imprisonment by the Regional Court. A Japanese woman who was visiting our country in August 2003 laid a complaint of rape against the appellant. She alleged that while she was (on or about 23 August 2003) sleeping in a compartment on the Dessert Express train owned and operated by Transnamib, the appellant entered, held a knife to her throat and raped her, threatening to kill her if she did not comply.

[2] The appellant initially denied that he was in the complainant's compartment, or that he raped her. The cross-examination by his counsel of State witness was aimed at buttressing this line of defence. The State's case placed him squarely in the complainant's compartment at the time the complainant says he was there. When he came to testify the appellant, obviously realising that the prosecution case was unanswerable, admitted to almost everything the complainant said, except that he raped her. He said he entered the compartment, asked to have sexual intercourse with the complainant and when she refused used force in order to achieve his illegal objective, but failed and ran away when the minor daughter of the complainant woke-up.

[3] On the merits the only issue for me to decide is whether or not the State proved beyond reasonable doubt that the appellant raped the complainant using a knife. The State proved that the appellant was seen completely naked by one of his colleagues as he entered the room he slept in early in the morning. He sought to deny even this and said that only his trunk was not on but that he had his underwear on. The fact that he still preferred to lie about this is most incriminating in considering whether or not his version is reasonably possibly true that he did not rape the complainant.

[4] Mr Mbaeva, acting for the appellant in both the court *a quo* and on appeal, laid great store by the fact that the husband of the complainant in the morning, when the employees (including the appellant) of Desert Express were confronted about the nocturnal pursuits of the appellant, said someone attempted to rape his wife. First, nowhere in the record do I find that the

complainant herself said to those that heard that a rape was attempted on her. In cross-examination of her Mr Mbaeva did not also challenge her with this version so that the Court could properly evaluate the matter in the light of all the evidence. What is known is that the complainant made a complaint of rape to the police and came to confirm it in Court. I do not therefore attach great significance to the fact that the husband of the complainant said there was an attempted rape on his wife. Her testimony was that the penetration was brief and she thought he did not ejaculate. Her husband may have been confused about this. Consider also that he had to relay this very embarrassing fact that his wife was violated before all those strangers. The Magistrate had the advantage of seeing and observing the witnesses. He was satisfied that the complainant's version was true beyond reasonable doubt that she was raped. I do not find anything in the record to upset that finding.

[5] True, the complainant was a single witness as to the rape but everything she said happened in the compartment, which initially was gainsaid by the appellant, was corroborated in every material particular by other evidence and was owned up by the appellant. The Magistrate had regard to that and was satisfied that the complainant's evidence was to be believed that she was raped. I do not find anything in the record to justify this Court to upset that finding. I am therefore satisfied that the appellant was correctly convicted of rape.

[6] The Court *a quo* also found that the appellant held a knife to the complainant's throat when he committed the rape. Again he was satisfied that the complainant's version should be believed. The complainant testified that her assailant left with the knife. It can hardly be surprising therefore that the

knife was not found. I cannot fault the finding by the trial Court that the rape was committed using a knife. This is an aggravating circumstance in terms of s 2(1)(a) of the Combating of Rape Act, No. 8 of 2000 which attracts a minimum sentence of 15 years.

[7] The appellant was an employee of Transnamib which owns and operates the Dessert Express. He used this vintage position of trust to obtain a master key to all compartments, entered the room of an unsuspecting visitor to our country in order to rape her. How can visitors to this country feel safe with sexual predators such as the appellant around? This crime was not committed in some dark alley in a desolate part of our country. It happened on the Dessert Express Train marketed as a flagship of our country's tourism industry. It was committed by a person in the employ of Dessert Express, not by a stranger. Where else can the public be safe these days?

[8] This act was as brazen as it was audacious. The appellant said he entered the room to have sexual intercourse with the complainant. The evidence shows he served the complainant and her family earlier that day. He must have known, not only that she was a married mother whose family was with her, but that she did not sleep in the same compartment with her husband and could thus be violated with impunity. He said he lost control when the complaint refused to have sex with him. There is no suggestion the subject was discussed between them earlier. The aggravating circumstances in this case are so overwhelming. The appellant must count himself lucky that the Court imposed the minimum penalty allowable in the circumstances. I think he deserved even

worse. The learned trial Magistrate was correct in concluding that there were no substantial and compelling circumstances.

[8] The factors referred to by Mr Mbaeva in both the Court *a quo* and here on appeal as constituting substantial and compelling circumstances, relate to whether or not the appellant should have been convicted of rape. The trial Court, as it was entitled to, rejected them in preference for the State's version. I cannot fault it for doing so. The appeal against sentence too is therefore dismissed and the conviction and sentence are confirmed.

DAMASEB, JP

ON BEHALF OF THE APPELLANT:

MR T MBAEVA

INSTRUCTED BY:

MURORUA & ASSOCIATES

ON BEHALF OF THE RESPONDENT:

MS H JACOBS

INSTRUCTED BY:

**OFFICE OF THE PROSECUTOR-
GENERAL**